IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 499 of 1986

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

SUDHIRBHAI B KHATALVADIYA

Appearance:

MR AJ DESAI APP for Appellant

MR DD VYAS for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 05/05/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE J.R.VORA)

1. This Appeal is preferred by the State against judgment and order delivered on 16.1.86 by learned Sessions Judge, Valsad at Navsari, in Sessions Case No. 36 of 1985, wherein respondent who was accused in the said Sessions Case, came to be acquitted of the charges levelled against him for the offence punishable under Section 376 of the Indian Penal Code.

2. The incident in question occurred on 30.3.1985 at night. On that day there were two festivals - one of "Ramnavami" and other was "Navratris". The victim of the incident is girl Bharti, daughter of complainant Kamalaben. On account of Navratri, there were "garbas" at the temple of Goddess, while on account of Ramnavami, there were bhajans at the temple of Saibaba at village Khatalvada, Taluka Umargam. On the day of the incident, Bharti had been to participating garba and other members of the family including her mother had been to temple of Saibaba for bhajans. Bharti was to return to the Saibaba Temple after garba. But since Bharti did not return to Saibaba temple till late night, her mother Kamalaben Complainant- PW-1 started searching for Bharti. She was not at their house and, therefore, Champaben, who happened to be her sister-in-law (bhabhi), was awakened and one Dipakbhai, brother-in-law of Champaben also started searching Bharti. After sometime Bharti and accused were found from the house of one Batukbhai Prakashbhai Maganbhai, who was staying in the same falia, in which complainant was staying. Accused and Bharti were underneath a cot and they were taken out. Complainant Kamalaben and Champaben both were informed by Bharti that the accused had committed rape on her on promise of marriage, for which he gave her silver ring, and thereafter on 5.4.1985, on account of this incident, a panch of their caste was called for a meeting to discuss the incident. The accused, his mother and brother-in-law Maganbhai remained present while victim girl Bharti, her mother Kamalaben and Champaben remained present, and since father of Bharti was out of state, was not present. After hearing the parties, the panch decided that the accused should marry Bharti but accused and his family members opposed the recommendation of Panch and, therefore, on 16th of April, 1985 PW-1 Kamalaben gave First Information Report about the incident before Umargam Police Station. After investigation, charge sheet for the offence punishable under Section 376 came to be filed against the accused and the case was committed to Court of Sessions, Valsad at Navsari. Learned Sessions Judge framed charge for the above said offence against the accused vide Exh.1 on 8th of January, 1987, to which he pleaded not guilty and,

therefore, the prosecution examined as many as 7 witnesses to prove its case.

3. PW-1 Kamalaben is examined at Exh.4 and according to her complaint she stated that since Bharti did not return to bhajans, she was searched with the help of Dipak and Champaben. Accused and Bharti were found from the house of Batukbhai.

4. PW-2 Bhartiben is examined at Exh-5. She stated that she used to go to the house of one Maganbhai Dhabuvala, brother-in-law of the accused, where she met the accused and both started conversations. After some time the accused induced her to marry him and on the day of the incident after garbas were over and while she was going to bhajans, accused met her and took her to the said house. This house belonged to one Batukbhai where accused took her to one room. Both were slept on a cot where accused committed rape on her and thereafter gave her one sliver ring as an inducement of marriage. She stated that the accused asked her to behave as husband and wife. She consented that and thereafter again both of them joined in intercourse. She did not make any resistance to the intercourse. The house of the door was knocked thereafter and on finding that her mother Kamalaben, mama Dipak and mami Champaben were outside the house, accused and she herself went underneath the cot, but they were found out and were taken to her house by her mother. In cross-examination she admitted to have consented for intercourse with the accused. She also stated that her underwear and petticoat were soaked in blood. They committed the act twice. She stated her age to be of 15 years on the say of her mother, mama and mami and because the accused refused to marry her, her mother filed the complaint against the accused.

5. PW-3 Exh. 6 Champaben accompanied PW-1 Kamalaben in search of victim girl Bharti, and was present when Bharti was found from the house of one Batukbhai, and was also present when caste panch met to resolve the dispute.

6. PW-4 Exh.7 Pritamber Nanjibhai was at the relevant time member of caste panch. According to him, on 5th of April, 1985, panch met for the proceedings to resolve the dispute between the accused and Bhartiben, panch inquired from accused and Bhartiben both and decided that the incident occurred with the consent of both and, therefore, panch recommended marriage of accused and Bharti, to which accused refused.

7. PW-5 Dr.Rajendrakumar Dipchand Exh.12, on 16.4.1985 was the Medical Officer of Primary Health Center at Sanjana where victim was sent to him with the Police Yadi at 3.30 p.m. He found that there were no injuries or teeth marks on any part of body, genetial developed, no sign of semen found, hymen was ruptured, and she was found habituated for intercourse. He produced the certificate at Exh. 13.

8. PW-6 Ranvantsinh Makansinh Solanki is examined at Exh.14, before whom PW-1 gave FIR on 16.4.85 at about 12.30 p.m. and he investigated the offence.

9. From the above evidence, the learned Trial Judge came to the conclusion that the prosecution failed to prove the case against the accused beyond doubt and, therefore, he was acquitted and hence this Appeal.

10. Learned Counsels for the parties were heard at length.

11. This is an acquittal appeal where the courts should be loath to interfere with the findings of the Trial Judge for acquitting the accused. The court must examine the reasons on which the order of acquittal is based and must reach to the conclusion that the view taken by the acquitting Judge was clearly unreasonable, erroneous and could not have been taken in the facts and circumstances of the case. Unless the conclusion is reached that the reasons given by the Trial Judge for the acquittal are not tenable at all, then and then only, the order of acquittal should be interfered with and not lightly or merely because on appreciation of evidence some other view is possible.

12. Appreciating the evidence of the witnesses as narrated above and taking into consideration the reasons given by the Trial Judge for the acquittal, it clearly appears that this is not the finding of the Trial Judge which requires any interference. Beside many contradictions as narrated by the learned Trial Judge in his judgment while discussing Issue No.1 that whether prosecution proves that the accused committed rape on victim Bharti and negativing the same from the above evidence, it becomes clear that PW-2 victim girl Bharti in express term admitted that accused committed the act of intercourse with her consent, the act was committed twice and in these circumstances without any force being used by the accused. Therefore, what is necessary is to examine whether victim was below age of 16. In this respect though the investigation is not proper, the

prosecution tried to examine PW-7 Mohanbhai Durllabhbhai Rana at Exh.16 being Head Master of Primary School of Khatalvada, who produced at Exh. 17 a certificate and record of the school, wherein the date of birth of the victim girl is mentioned to be 16th of October, 1969 because she studied in the said school upto VIth Std., and accordingly on the date of incident the victim girl was about 15 years 5 months and 15 days according to this certificate at Exh.17. PW-1 Kamalaben admitted in her evidence that Bharti had born at Mumbai in a hospital and her birth was registered in Corporation of Bombay, but this fact could not be investigated. Had this birth certificate could have been produced by the prosecution, the same could be believed to be important and primary evidence. So far as Exh. 17 is concerned, it is based on information given by mother of victim and according to a decision of this Court in the matter of The STATE OF GUJARAT vs. JIVANLAL CHHOTALAL PATEL, as reported in 1985 GLH 388, the date of birth as recorded in the school on the information given by the relatives of the student may not provide conclusive proof as against the primary evidence of registration of birth before the concerned authority. Especially in these circumstances wherein according to even the say of the prosecution, the victim was short of four and half months to attain the age of 16 years, and in the absence of primary evidence of age, it could be said that the prosecution failed to prove beyond doubt that the prosecutrix was below the age of 16, and was not competent to give consent for the intercourse. The way in which the prosecutrix has deposed, taking into consideration the medical evidence which discloses that there were no external marks of injury on the body of the victim, when it is found by medical expert examining the victim that she was habituated to intercourse, it is unable for us to believe that prosecutrix was below the age of 16, and the reasons given by the learned Trial Judge for doubting the prosecution case appears to us to be tenable and reasonable. As said above, firstly, the prosecution failed to prove the case against the accused respondent about having committed the rape because of the contradictions in the evidence of prosecution witnesses and secondly that this is a clear case of consented intercourse, wherein the prosecution has failed to prove that the prosecutrix is below the age of 16 years, in our considered view, benefit of reasonable doubt must go to the accused. In this view of the matter, the learned Trial Judge rightly acquitted the accused and no interference is required in such finding in this Appeal. Accordingly the following order is passed.

" Appeal fails and stands dismissed. Bail bond

of the respondent accused stands cancelled.

(B.J.Shethna, J.)

(J.R. Vora, J.)

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